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## Via FedEx

Mr. Gerald R. Rome Deputy Commissioner Colorado Division of Securities 1560 Broadway, Suite 900 Denver, CO 80202

Dear Mr. Rome:



This letter is to serve as a request for an Order of Exemption as authorized by Section 11-51-402(5)(b) and (6) of the Colorado Securities Act (the "Act") or in the alternative for a formal opinion of non-applicability of the Colorado statutory requirements concerning the licensing of investment advisors pursuant to Section 11-51-401(1.5) of the Act. This letter is being submitted on behalf of our client, Baceline Investments, LLC, a Colorado limited liability company based in Denver, Colorado and its principals, as described below, (collectively "Baceline"). This letter is accompanied by a non-refundable opinion fee of (\$100) payable to the Colorado Division of Securities and a proposed Order.

The following is a summary of the facts:

- 1. Baceline is a Colorado limited liability company. Baceline's principals are David Puchi, Douglas Arnold and Craig Zoellner.
- 2. Baceline manages, directly or indirectly through organizationally separate but operationally integrated entities that are under its common control and management, several investor Funds (each a "Fund" or collectively the "Funds") that invest in real property, as illustrated on the diagram attached to this correspondence as Exhibit A.
- 3. Baceline provides various accounting, administrative and other services to the Funds and is compensated at market rate for these services.
- 4. The Funds are organized as limited liability companies ("LLC"). Each Fund is governed by the terms of its limited liability company operating agreement (a "Fund Operating Agreement").
- 5. Each Fund makes a private placement of membership interests represented by units to accredited investors in compliance with Rule 506/Regulation D of the Securities Act of 1933 and the corresponding state notice requirements. The terms of such units are disclosed in the Fund private placement memorandum and the

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Fund Operating Agreement, which include full disclosure of all the designations, rights and preferences associated with the units, the Fund's real property acquisition strategy, and the fee and return structure of the Fund. It is disclosed to investors that Investor returns are based on the performance of the real estate held by the Fund.

- 6. The Funds issue units to investors who execute a subscription agreement, affidavit of accredited investor status and Fund Operating Agreement (the "Subscription Documents").
- 7. Each Fund is managed by a Fund manager that is also a limited liability company that is owned, managed and controlled by Baceline (each a "Fund Manager").
- 8. The duties, obligations and financial interest of a Fund Manager are set forth in the Fund Operating Agreement, to which the Fund Manager is a party. These relationships are disclosed to investors prior to subscription to the Fund and execution of the Fund Subscription Documents. The Fund Manager is only compensated based on the Fund property's performance, and only after a positive return is paid to investors.
- 9. The purpose of the Funds is to provide investors with an opportunity to invest (in diversified holdings in commercial real property that are controlled and managed by Baceline. Each Fund uses the invested capital to purchase and own directly or beneficially, commercial real property that (i) the Fund either specifically identifies to investors in advance or (ii) meets specific criteria for Fund properties set forth in the Fund offering documents provided to investors prior to their subscription to the Fund ("Property"). Invested capital or profit dollars may be temporarily placed in Short-Term Investments (money market or highly liquid investment-grade bonds or similar instruments) in anticipation of investment or distribution. The returns for such Short-Term Investments are not considered part of the Fund's overall investment and return profile. The Fund also uses a portion of the invested capital to pay administrative and management expenses of the Fund.
- 10. Baceline, on behalf of each Fund, determines which Properties will be acquired by the Fund in accordance with the Fund's disclosed investment purpose and objectives and how those Properties will be structured to protect against liability exposure of other Fund investments.
- 11. A Fund typically holds Property in its portfolio through special purpose entities (each a "SPE") formed for the sole purpose of acquiring, owning and managing individual properties. The Funds put the SPE structure in place for a variety of reasons, including limitation of liability, financing arrangements, management, tax and insurance matters. This is a prudent measure reflecting best practices in the industry to protect the Fund's investors from unnecessary exposure to collateral risk.

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- 12. When a Fund owns Property through a SPE, the applicable Fund Manager acts as the manager to the SPE and operates and manages the Property. Further, the Fund enters into an operating agreement as a member of the SPE pursuant to which it owns securities issued by the SPE.
- 13. A Fund typically holds five-to-eight properties in its portfolio, each through an SPE. Two or more Funds may also jointly hold the securities of a single SPE if the target Property meets each Fund's disclosed investment objectives.
- 14. The SPE structure is fully disclosed to potential investors prior to their subscribing to the Fund and executing a Fund subscription and operating agreement. The SPE's are typically single member LLC's and are disregarded entities for federal tax purposes.
- 15. An investor in a Baceline Fund is not allowed any discretion regarding the direction of allocation of their invested funds to one or more Fund Properties to the exclusion of others. Further, a Fund Manager cannot specially allocate investor funds to one or more Fund Properties to the exclusion of others.
- 16. Baceline markets its Funds directly to investors and their intermediaries, however it does not advise investors on the prudence of purchasing interests in any fund. Neither Baceline, its principals, nor its affiliates advertise or hold themselves out as a provider of investment advisory services. Accordingly, none of the Fund investors receive, or are charged any fees for, investment advice by Baceline.
- 17. Neither Baceline nor its affiliated persons or entities is subject to any statutory disqualification from registration as an investment adviser or as an investment adviser representative under the Investment Adviser Act of 1940, or from investment adviser or investment adviser representative licensing under the Colorado Securities Act.

The definition of an "investment adviser" under the Investment Advisers Act and C.R.S. 11-51-201(9.5) is "...any person who, for compensation, engages in the business of advising others... as to the value of securities or as to the advisability of investing in, purchasing, or selling securities...".

It is well established that a fee interest in real property is not a security. If a Fund purchased real property directly, rather than indirectly through a SPE, it would not be purchasing a security, and therefore under those circumstances neither the Fund nor its manager would fall under the definition of an Investment Adviser.

The insertion of a SPE into the real property ownership structure for real and significant business purposes, which in turn results in a Fund holding a security issued by the SPE that holds the real property rather the than the Fund owning the real property directly, should not trigger the application of the investment adviser rules to the Fund Manager or its affiliates because the Fund maintains all of the indicia of complete and beneficial ownership [48657\_3]

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and direct and active control of the real property that it would have if it owned the real property directly.

Further, is generally accepted that an adviser to a fund – even one who is a fund manager – is not an investment adviser to any investor in the fund because the adviser is not offering individual investment advice to an investor but rather to the fund. An investor may benefit from the adviser's advice, but he does not receive the advice directly. The fund manager controls the disposition of the pool of capital in the fund. And the investor makes their decision how to spend their money only at the point of investing in the fund. (See, e.g. Goldstein v. SEC, 451 F 3d 873, 879-880 (D.C. Cir. 2006)).

Based on the foregoing, requiring Baceline or its affiliates to obtain an investment adviser license or an investment adviser representative license under the Colorado Securities Act would not advance public interest.

We respectfully request that you issue an Order exempting Baceline and its affiliates from investment adviser and investment adviser representative licensing requirements pursuant to C.R.S. Section 11-51-402(5)(b) and (6), as such Order would be consistent with the protection of investors and the other purposes of the Colorado Securities Act. For your convenience we have included a proposed order with this request.

Thank you for your prompt and thoughtful consideration of this request. Please do not hesitate to contact our office for clarification of any of the matters discussed above, or for any additional information.

Kind regards,

GOODSPEED MERRILL & BENSON

Nathan S. Merrill, Esq.

Enclosure